

COPY

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2007-CP-00152-COA

FILED

Appellant

Junior Kimble

MAR 09 2007

VS.

Appellee

State of Mississippi

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SUPREME COURT
COURT OF APPEALS

BRIEF OF APPELLANT

Respectfully Submitted,

Junior Kimble
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Greenwood, MS. 38930

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI
NO. 2007-CP-00152-CA

Junior Kimble

Appellant

VS.

State of Mississippi

Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned pro se Appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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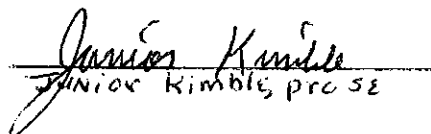

Junior Kimble, pro se

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of Issues.	1.
Statement of Case.	2.
Summary of the Argument.	3.
Argument	12.
Conclusion.	20.
Certificate of Service.	21.

TABLE OF AUTHORITIES

CASE	PAGE
Alexander v. State, 605 So.2d 1170 (Miss. 1992).	13
Austin v. State, 734 So.2d 234 (Miss. Ct. App. 1999)	15
Baker v. State, 358 So.2d 401 (Miss. 1978).	13
Boykin v. ALABAMA, 395 U.S. 238 (1969).	16
Buford v. State, 756 So.2d 815 (Miss. Ct. App. 2000)	18
Conerly v. State, 607 So.2d 1153 (Miss. 1992).	18
Gable v. State, 748 So.2d 703 (Miss. 1999).	19
Gray v. State, 819 So.2d 542 (Miss. Ct. App. 2002)	17
Harris v. State, 806 So.2d 1127 (Miss. 2002).	14
Hill v. Lockhart, 474 U.S. 52 (1985).	13
Jefferson v. State, 556 So.2d 1016 (Miss. 1989).	17
Leatherwood v. State, 539 So.2d 1378 (Miss. 1989).	13
Lott v. State, 577 So.2d 627 (Miss. 1992).	15
Marchibroda v. United States, 368 U.S. 487 (1962)	14
McMANN v. Richardson, 397 U.S. 759 (1970).	12
Myers v. State, 583 So.2d 174 (Miss. 1991).	19
Neal v. State, 525 So.2d 1279 (Miss. 1987).	20
Nelson v. State, 624 So.2d 121 (Miss. 1993).	16
Readus v. State, 2003, 837 So.2d 209.	19
Sanders v. State, 439 So.2d 1271 (Miss. 1983).	19
Smith v. State, 500 So.2d 973 (Miss. 1986).	12
Smith v. State, 636 So.2d 1220 (Miss. 1994).	13
State v. Sansome, 133 Miss. 428 (1923).	17
Strickland v. Washington, 466 U.S. 668 (1984)	12, 18
Sullivan v. Pouncey, 469 So.2d 1233 (Miss. 1985)	14
Taylor v. State, 682 So.2d 359 (Miss. 1996).	16
Vittitoe v. State, 556 So.2d ¹⁰⁶² 916 (Miss. 1990).	19
Washington v. State, 620 So.2d 966 (Miss. 1993)	14
White v. State, 751 So.2d 481 (Miss. Ct. App. 1999)	20
Williamson v. State, 64 Miss. 229 (1887).	15
Wilson v. State, 577 So.2d 394 (Miss. 1991).	12, 13

TABLE OF AUTHORTIES

UNITED STATES CONSTITUTION

SIXTH AMENDMENT 12

MISSISSIPPI CONSTITUTION

Art. 3, SECTION 26 12
Art. 3, SECTION 27 18

UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE

RULE 7.06(6) 17
RULE 8.04(A)(3) 15

MISSISSIPPI CODE ANN.

SECTION 99-7-9 17

STATEMENT OF ISSUES

1. INEFFECTIVE ASSISTANCE OF COUNSEL IN TENDERING PLEA OF Guilty.
2. TRIAL COURT FAILED TO FORM A FACTUAL BASIS TO ACCEPT Kimble's PLEA OF Guilty.
3. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO DEMUR THE INDICTMENT THAT DID NOT GIVE TRIAL COURT SUBJECT MATTER JURISDICTION.
4. TRIAL COURT ABUSED ITS DISCRETION IN SUMMARILY DIMISSING Kimble's POST-CONVICTION MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING.

STATEMENT OF CASE

During the November Term 2005, the Grand Jury of Lee County, Mississippi, returned AN indictment charging Junior Lee Kimble with Sexual Battery upon Jessica Kimble, being CAUSE NO. CRO5-837. The same Grand Jury also indicted Junior Lee Kimble with the charge of Sexual Battery upon Tracy Ann Chambers, being CAUSE NO. CRO5-838.

Junior Lee Kimble was released upon bond with instructions by the court not to have any contact with the alleged victims. Junior Lee Kimble was re-arrested after he had allegedly come into contact with one of the alleged victims, and was subsequently indicted during the February Term 2006, by the Lee County Grand Jury with the charge of Obstruction of Justice, being CAUSE NO. CRO6-193.

On August 14th 2006, Appellant Junior Lee Kimble entered a plea of guilty to both charges of Sexual Battery in CAUSE NOS. CRO5-837, AND CRO5-838, and was sentenced respectfully to Ten (10) years on each count to be served in the Mississippi Department of Corrections. Said sentences were to be served concurrently.

During the same proceeding, Appellant Junior Lee Kimble, entered a plea of guilty in CAUSE NO. CRO6-193, to the reduced charge of Intimidation of a Witness, and was sentenced by the Circuit Court of Lee County, Mississippi, to serve a term of Five (5) years probation, to be served consecutively to CAUSE NOS. CRO5-837, AND CRO5-838.

Appellant Junior Lee Kimble, on or about the 13th day of October, 2006, filed his post-conviction motion into the Circuit Court of Lee County, Mississippi, pursuant to Mississippi Code Ann. Section 99-39-5(1)(F) (Supp. 2000), being CAUSE NO. CRO6-209(PF)L. This motion was subsequently

summarily dismissed by the Circuit Court of Lee County, Mississippi, without an evidentiary hearing on January 9th 2007. This appeal stems from the denial of the Circuit Court of Lee County, Mississippi of the post-conviction motion.

SUMMARY OF THE ARGUMENT

1. Ineffective Assistance of Counsel in Tendering Plea of Guilty

Attorney John Helmert, (hereinafter known as trial counsel), was appointed by the Circuit Court of Lee County, Mississippi, to represent Appellant Junior Lee Kimble, (hereinafter known as Kimble), used threats and coercion to force Kimble to enter a plea of guilty to the indictments.

Trial counsel did misrepresent to Kimble, that if he chose to go to trial, that he would be found guilty. After being found guilty he would be sentenced to Two(2) Life sentences on the sexual battery charge, and Ten years on the Obstruction of Justice charge. Kimble being at this time Sixty-Three(63) years old, was terrified by this prediction of trial counsel. Kimble then stated that he would discuss this proposition with his aged mother, and his lady friend.

Kimble then did return home, being again released on bond. Kimble related to his mother, Pauline Kimble, what trial counsel had told him he would be facing if he chose to go to trial. This did overwhelm his mother, so that she stated to Kimble that at his age, he could not take the chance of being sent to prison for life, and that he had better to listen to his attorney and plead guilty.

Grace Matthews, Kimble's lady friend was also present during this exchange between Kimble and his mother, and agreed that he

Could not take a chance of being convicted by a jury and sent to prison for life. Kimble feeling at this time that he had no choice, contacted his trial counsel and agreed to enter the plea of guilty to the charges.

This inaccurate and erroneous information given by trial counsel to Kimble, was deficient performance of counsel. This advice cause Kimble to enter his plea of guilty. At no time was Kimble in danger of being sentenced to life in prison. This erroneous misrepresentation by trial counsel, did prejudice Kimble by the fact that if not for trial counsel's misrepresentation of the sentencing exposure, he would not have plead guilty and would have insisted on a jury trial.

For this reason, Kimble's plea of guilty can not be considered to be given voluntarily and knowingly. He has been denied his Sixth Amendment right to the effective assistance of counsel. His plea was the product of his counsel's ineffectiveness.

2. Trial Court Failed To Form A Factual Basis To Accept Kimble's Plea of Guilty

Kimble was brought before the trial court with several other defendants, who were not connected with Kimble in any way to enter their pleas of guilty. These other defendants and Kimble were asked if they understood their constitutional rights. Then the trial court asked the prosecution to read the charges against Kimble. Once this was done, the trial court asked Kimble how he plead, of the which, he replied "Guilty." Then the trial court accepted the plea and did enter

judgment upon All the charges.

In doing this, the trial court failed to form the required factual basis in order for that court to accept Kimble's plea of guilty. It is stated in the Uniform Rules of Circuit and County Court Practice, Rule 8.04(A)(3), that the court must form this factual basis for a plea of guilty to be valid. The trial court failed to ascertain whether the elements of the offense were present, and that what was charged in the indictment, was actually what Kimble was pleading guilty too.

This was not done by the trial court, and the trial court did accept Kimble's pleas of guilty in violation of Rule 8.04(A)(3). As the rule dictates that a mere reading of the indictment in the presence of the defendant, and then asking him if he is guilty of the offense, will not be sufficient to form a factual basis for the plea of guilty. Rule 8.04(A)(3) states that the trial court must question the defendant personally to see if he had actually committed the crime of which he is pleading guilty.

The trial court did not question Kimble personally to ascertain whether Kimble's actions met the required elements of the offense charged. This is so, because of the fact that the trial court accepted a collected plea of guilty from Kimble and several other defendants at the same time. It cannot be said that Kimble's guilty pleas will pass constitutional muster.

Since the trial court failed to have the guilty plea proceedings transcribed as required by rule, there is no record for this Court to weigh the merits of this claim. This Court should find Kimble's

CLAIM VALID AND REVERSE AND RENDER THE GUILTY PLEA CONVICTIONS.

KIMBLE ASSERTS THAT HE HAS BEEN DENIED HIS DUE PROCESS RIGHTS IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE 3, SECTION 14 TO THE MISSISSIPPI CONSTITUTION.

3. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO DEMUR THE FATALLY DEFECTIVE INDICTMENT

IN THE CASE SUB JUDICE, KIMBLE'S TRIAL COUNSEL CALLED KIMBLE AND ASKED HIM TO COME TO HIS OFFICE. ONCE THERE, TRIAL COUNSEL PRESENTED TO KIMBLE THREE SUPPOSED INDICTMENTS THAT HAD NOT BEEN SIGNED BY THE FOREMAN OF THE GRAND JURY, NOR WERE THE INDICTMENTS STAMPED FILED BY THE CIRCUIT CLERK OF LEE COUNTY, MISSISSIPPI. BUT, THESE INDICTMENTS HAD BEEN SIGNED BY THE DISTRICT ATTORNEY. (R. 26-31)

THOUGH THERE HAS BEEN INCLUDED THE SAME INDICTMENTS AS ABOVE BEING RETURNED BY THE GRAND JURY, AND FILED BY THE CIRCUIT CLERK ON THE 20TH DAY OF OCTOBER, 2005, DOES IN NO WAY CHANGE THE FACT THAT KIMBLE HAD BEEN PRESENTED UNSIGNED INDICTMENTS. (R. 36, 37). KIMBLE'S CLAIMS STAND ON THE DEFECTIVE INDICTMENTS ALONE, AND NOT THE MYSTERIOUS INDICTMENTS THAT HAVE BEEN MADE A PART OF THIS RECORD BEFORE THE COURT.

IT IS PLAIN THAT THESE INDICTMENTS WERE FATALLY DEFECTIVE, (R. 26-31), AS RULE 7.06(G) OF THE UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE MANDATES THAT "THE SIGNATURE OF THE FOREMAN OF THE GRAND JURY ISSUING IT," MUST BE INCLUDED IN THE INDICTMENT FOR THE INDICTMENT TO BE VALID. IT IS CLEAR FROM THE RECORD THAT THE INDICTMENTS

presented to Kimble by his trial counsel fails to comply with the rule.

Also, Mississippi Code ANN. Section 99-7-9 (2000), states in pertinent part:

"All indictments and the report of the grand jury must be presented to the clerk of the circuit court by the foreman of the grand jury or by a member of such jury designated by the foreman, with the foreman's name endorsed thereon, accompanied by his affidavit that all indictments were concurred in by Twelve (12) or more members of the jury and that at least Fifteen (15) were present during all deliberations, and must be marked "Filed" and such entry be dated and signed by the Clerk...."

The indictments in the case sub judice, had not been returned by the grand jury, as it is obvious that had they been such indictments that were returned by the grand jury, they would have been signed by the foreman and stamped "Filed" by the circuit clerk, then meeting the requirements of Rule 7.06(6) and Section 99-7-9 of the Mississippi Code.

Kimble asserts that these indictments were the product of the District Attorney's Office, and not that of the grand jury. That these indictments were never presented to the grand jury and was never considered by the grand jury. Rather, the indictments were manufactured by the District Attorney.

Kimble, who is semi-illiterate, and never before had had any type dealings with the judicial system, did not possess the legal expertise to know anything about the indictments, and was told by his trial counsel that he had been formally charged by indictment. Kimble had

to rely on the attorney's assertion that the indictments were valid.

Kimble's trial counsel was deficient, inasmuch as any trial lawyer that is worth his salt, could see from the face of all three indictments that they were fatally defective. But, Kimble's trial counsel failed to even investigate the indictments to see whether or not the indictments were returned by the grand jury.

Kimble's trial counsel was further deficient by failing to file a demurral to these indictments, and by allowing Kimble to enter a plea of guilty to an invalid indictment that did not show that it had been returned by the grand jury.

Article 3, Section 27 to the Mississippi Constitution, requires an indictment by a grand jury before a prosecution may be had in a felony case. Because it is the indictment returned by a grand jury that gives the court jurisdiction of a felony charge, and without an indictment the court does not possess jurisdiction of the case.

So, because of this fact, Kimble was prejudiced by his trial counsel's deficient performance, as the indictments did not give the trial court subject matter jurisdiction to accept a plea of guilty from Kimble.

Though a plea of guilty waives all non-jurisdictional defects committed prior to the entry of the guilty plea. But, a plea of guilty does not waive subject matter jurisdiction issues. It is obvious that the indictments in cause nos. CRO5-837, CRO5-838, and CRO6-193, did not give the trial court subject matter jurisdiction, as, they were not in compliance with Rule 7.06(4), Uniform Rules of Circuit and County Court

PRACTICE, AND MISSISSIPPI CODE ANN. SECTION 97-7-9 (2000), SO THAT THESE INDICTMENTS CAN NOT BE CONSIDERED VALID.

KIMBLE HAS BEEN DENIED HIS SIXTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION, AND ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF COUNSEL. THIS HAS DENIED HIM OF HIS RIGHT NOT TO BE PROCEEDED AGAINST EXCEPT BY AN INDICTMENT BY THE GRAND JURY. THIS WAS A VIOLATION OF ARTICLE 3, SECTION 27 OF THE MISSISSIPPI CONSTITUTION.

4. TRIAL COURT ABUSED ITS DISCRETION IN SUMMARILY DISMISSING KIMBLE'S POST-CONVICTION MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING

THE TRIAL COURT IN THE CASE SUB JUDICE, FAILED TO COMPLY WITH SECTION 99-39-11 MISSISSIPPI CODE ANN., IN THE SUMMARILY DISMISSAL OF KIMBLE'S MOTION FOR POST-CONVICTION RELIEF. IT IS PLAIN FROM THE TRIAL COURT'S ORDER OF DENIAL, THAT THAT COURT MADE ONLY A PERFUNCTORY CONSIDERATION OF SAID MOTION. KIMBLE PUTFORTH THE FOLLOWING REASONS THAT WILL SHOW THAT THIS ALLEGATION IS SO.

IN SAID ORDER, THE COURT STATED THAT KIMBLE HAD FILED A "MOTION FOR RECONSIDERATION OF SENTENCE." (R. 40). KIMBLE'S MOTION WAS PLAINLY TITLED "MOTION TO VACATE JUDGMENT AND SENTENCE." (R. 2). NOWHERE IN KIMBLE'S POST-CONVICTION MOTION DID HE SEEK A RECONSIDERATION OF HIS SENTENCE. THE GIST OF KIMBLE'S MOTION DEALT PRIMARILY WITH ISSUES THAT WERE ENTIRELY DIFFERENT THAN THAT OF A MOTION FOR RECONSIDERATION OF SENTENCE, AND IN THIS RESPECT, THE TRIAL COURT'S DENIAL BELIES THE MOTION

that he had filed into that court.

Furthermore, the trial court did not consider the Affidavits of two witnesses who were willing to testify under oath of the events that had lead to Kimble's plea of guilty. These witnesses did have first-hand knowledge to Kimble's claim of the deficient performance of counsel in the misrepresentation to Kimble of the consequences of a jury trial, and the sentence he would be facing on the charges against him. (R. 24, 25).

The trial court stated in the order of denial that "Petitioner cannot make a valid claim for ineffective assistance if the only proof he has concerning deficient performance of counsel is his own statement," (R. 40). This shows that the trial court only made a perfunctory observation of the motion, as the court did not know about the two Affidavits in support of his claims.

Finally, the trial court states that the "guilty plea transcript provide evidence contrary" to Kimble's claim that his plea was given involuntarily, and that the trial court did not have a factual basis to accept the plea of guilty from Kimble. But there is nothing in the record on appeal that supports this conclusion of the trial court, as, the guilty plea transcript has not been made a part of the record on this appeal.

But, this was no fault of the appellant, as he had filed the Designation of Record pursuant to Mississippi Rules of Appellate Procedure, Rule 10(b)(1), clearly setting forth that the "guilty plea transcript" was necessary to the issues raised on this appeal. (R. 43). But the request

For the guilty plea transcript has been ignored.

Kimble did bring this to the attention of the Clerk when he did receive the record on appeal for his review on February 8th 2007. When he noticed this error, he promptly notified Mrs. Joyce R. Loftin, Circuit Clerk of Lee County, Mississippi, on February 12th 2007, of this discrepancy in the record. (See Appendix 1-A). But no response was forthcoming from Mrs. Loftin, and the record was filed by the Circuit Clerk without it being in compliance with the designation of record.

Kimble asserts that the trial court did abuse its discretion in the summary dismissal of his post-conviction motion. The motion he had filed with that court did meet the pleading requirements of Mississippi Code Ann. Section 99-39-9 (Rev. 2000), which did entitle him to an in-court opportunity to prove his claims of involuntary plea and ineffective assistance of counsel.

Also, these claims were procedurally alive and did raise issues of fact that were in dispute, so that an evidentiary hearing was required for the court to resolve these issues. Or in the alternative, that court should have asked that a response be given by the State on his claims pursuant to Mississippi Code Ann. Section 99-39-13(3).

Kimble contends that because the trial court failed to resolve these issues in the proper manner, and in not doing so did abuse its discretion in the summary dismissal of his claims. That the least this Court can do is to reverse this case back to the trial court for an evidentiary hearing on the claims raised on this appeal.

ARGUMENT

1. Ineffective Assistance of Counsel in Tendering Plea of Guilty

It has long been held in the State of Mississippi, that a defendant pursuant to Article 3, Section 26 of the Mississippi Constitution, and the Sixth Amendment to the United States Constitution has the right to the effective assistance of counsel in the tendering of a plea of guilty. See, Smith v. State, 500 So.2d 973 (Miss. 1986), McMann v. Richardson, 397 U.S. 759, 771 (1970). In the case sub judice, Kimble has been denied this fundamental right.

Kimble's trial counsel misrepresented the consequences of going to trial and have the state prove him guilty beyond a reasonable doubt. Trial counsel told Kimble he would be given a life sentence if he was found guilty in a jury trial. This was clearly an erroneous misrepresentation of counsel, because sexual battery does not carry a life sentence, and counsel did tell Kimble this to induce him to plead guilty.

When evaluating claims of ineffective assistance of counsel, the standard that was established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under this standard, the petitioner must show (1) that counsel's performance is deficient and (2) that the deficient performance was prejudicial to the defendant in the sense that it undermined confidence in the outcome. See also, Wilson v. State, 577 So.2d 394, 396 (Miss. 1991).

In the case sub judice, when trial counsel did misstate the sentencing exposure that Kimble would be facing if found guilty at trial, did undermine confidence in the outcome. Because if not

for this erroneous advice, Kimble would have surely insisted on going to trial if he had been correctly informed.

The Mississippi Supreme Court held in Alexander v. State, 605 So.2d 1170 (Miss. 1992), that "[w]here a defendant enters a plea on advice of counsel, the attorney's performance is deemed 'deficient' for purposes of the Strickland standard if it falls below 'the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985). (quoted in Wilson v. State, 577 So.2d 394, 396 (Miss. 1991)). A defendant who pleads guilty to a crime is 'prejudiced' by his counsel's erroneous advice if "he would have insisted on going to trial if he had been correctly informed." Wilson, 577 So.2d at 394; Hill, 474 U.S. at 59.

Kimble has met this standard and was denied his right to the effective assistance of counsel. It has been held by the Mississippi Supreme Court, that counsel's performance is deficient when that counsel does advise his client to plead guilty upon erroneous interpretation of state law. See, Leatherwood v. State, 539 So.2d 1378 (Miss. 1989). This requires the vacation of Kimble's guilty plea conviction.

A "voluntary plea" within the meaning of Mississippi Uniform Criminal Rules of Circuit Court Practice, "is one which is not induced by fear, violence, deception or improper inducements." See, Smith v. State, 636 So.2d 1220 (Miss. 1994). Kimble's plea of guilty cannot be considered as a voluntary act on his part, because it was induced by fear and deception of receiving a life sentence if he went to trial. The Mississippi Supreme Court held in Baker v. State, 358 So.2d 401 (Miss. 1978), the following:

"If, as alleged, appellants pleaded guilty under the mistaken advice that they could be subject to capital punishment if convicted at trial, this then, is a factor which make appropriate a collateral attack... Such allegation, if true, indicates that defendants were not fully aware of the implications of their plea nor of the true consequences of a trial by jury. Such a circumstance, if properly pleaded and supported by sufficient facts, makes out a case where relief may be appropriate." Id. 403.

Kimble presented with his own sworn affidavit to the court, the affidavits of his aged mother, Pauline Kimble, and his friend Grace Matthews. Considered as a whole, there was sufficient facts that were presented to the trial court that did entitle Kimble to an in-court opportunity to prove his claims. See, Washington v. State, 620 So.2d 966, 967 (Miss. 1993). But that court did ignore the facts that were presented in Kimble's post-conviction motion.

Kimble's plea was not voluntarily and intelligently entered, and the United States Supreme Court held in Marchibroda v. United States, 348 U.S. 487 (1962), that "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."

Kimble's plea is unconstitutional and should be vacated as a matter of law. Kimble should be allowed to be placed back into the position that he was in before he entered his plea, and that he should be granted a jury trial. See, Sullivan v. Pouncey, 469 So.2d 1233, 1234 (Miss. 1985); also Harris v. State, 806 So.2d 1127 (Miss. 2002). That this Court should vacate the circuit court's denial of his post-conviction motion on this issue.

2. Trial Court Failed To Form A Factual Basis To Accept Kimble's Plea Of Guilty

"Factual basis is an essential part of the constitutionally valid and enforceable decision to plead guilty, and that basis cannot be implied from the fact that defendant entered a plea of guilt." Austin v. State, 734 So.2d 234 (Miss. Ct. App. 1999). In the case sub judice, the trial court failed to find the requisite factual basis to accept Kimble's plea of guilty.

The trial court must have an evidentiary foundation in the record which is sufficiently specific to allow the court to determine that Kimble's conduct was within the ambit of that defined as criminal. Because the trial court only accepted Kimble's plea of guilty after the prosecution read the charge from the indictment, Kimble asserts that, without nothing more, did not satisfy the requirement that a factual basis did exist and the trial court should have not accepted his plea of guilty. See on Lott v. State, 597 So.2d 627, 628 (Miss. 1992).

Rule 8.04(A)(3) of the Uniform Rules of Circuit and County Court Practice, dictates that the trial court must form this factual basis for a plea of guilty to be valid. The trial court failed to ascertain that the elements of the offense were present, and that what was charged in the indictment was actually what Kimble was pleading. A mere reading of the indictment in the presence of Kimble, and then asking him if he is guilty of this offense, was not sufficient to form a factual basis for the plea. The trial judge should have

questioned Kimble personally to see if he actually did the crime. Since the trial court failed to do this, there was not a factual basis for that court to accept Kimble's plea of guilty, and enter a judgment of conviction against him. See, Nelson v. State, 626 So.2d 121, 126 (Miss. 1993).

The courts in the state of Mississippi are admonished to make a complete record of guilty plea proceedings, see, Taylor v. State, 682 So.2d 359 (Miss. 1996), Kimble asserts that the trial court failed to do so in this case. Though in the order of the trial court in its denial of Kimble's post-conviction motion made an allusion to the record to support its denial, no plea transcript has been made a part of the record on appeal.

It is well settled law in the state of Mississippi that "the appeal courts may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record." Dillon v. State, 641 So.2d 1223, 1225 (Miss. 1994). Since the trial court did not make a record of Kimble's guilty plea proceedings, and there is no transcript in the record filed on appeal. This court should accept Kimble's claim on this issue as true.

For this reason, Kimble does assert that the trial court did not have a factual basis to accept the plea of guilty. See, Boykin v. Alabama, 395 U.S. 238 (1969). That the trial court abused its discretion in denying Kimble relief on this claim in his post-conviction motion. That this court should reverse the trial court's order of denial, and reverse this case for an evidentiary hearing.

3. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO DEMUR THE FATALLY DEFECTIVE INDICTMENTS.

The indictments in the case sub judice, were fatally defective as they did fail to conform to the requirements of Rule 7.06(c) of the Uniform Rules of Circuit and County Court Practice, and Mississippi Code Ann. Section 99-79 (2005), this was because of the fact that they were not signed by the foreman of the grand jury, nor were they signed and stamped "filed" by the circuit clerk. (A. 26-31). Kimble's trial counsel presented these indictments to him, and never spoke a word about them being fatally defective.

This was ineffective assistance on the part of trial counsel, as it has long been held in the state of Mississippi that it is unconstitutional to proceed against a defendant without a valid indictment returned by the grand jury. See, State v. Sansome, 133 Miss. 428, 97 So. 753 (1923). Kimble's trial counsel was deficient when he failed to demur these indictments.

Kimble's trial counsel was further deficient when he advised Kimble to enter a plea of guilty to these indictments, because it cannot be said with certainty that these indictments were returned by the grand jury, as they were neither signed nor filed as being so. There is a good chance that Kimble's trial counsel allowed him to enter a plea of guilty to the indictments without actually being indicted by the grand jury. See on Gray v. State, 819 So.2d 542 (Miss Ct. App. 2002).

Trial counsel knew that it is the indictment that gives the trial court the jurisdiction to try a felony case. See, Jefferson v. State, 556

So.2d 1016 (Miss. 1989), and since Kimble's indictments were fatally defective, the trial court did not have the subject matter jurisdiction to accept Kimble's plea of guilty. See on Williamson v. State, 64 Miss. 229, 1 So. 171 (1887).

Kimble's trial counsel was deficient, and Kimble has been prejudiced by this deficient performance of counsel, by the very fact that counsel allowed him to be proceeded against in violation of Article 3, Section 27 of the Mississippi Constitution by being not indicted by the grand jury.

Though a guilty plea waives any non-jurisdictional defect in the indictment, Buford v. State, 756 So.2d 815 (Miss. Ct. App. 2000), a plea of guilty does not waive a claim that the indictment failed to give the trial court subject matter jurisdiction. See, Conerly v. State, 607 So.2d 1153 (Miss. 1992).

Kimble has been denied his right to the effective assistance of counsel, and pursuant to the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), his plea of guilty to these defective indictments should be vacated.

4. Trial Court Abused Its Discretion In Summarily Dismissing Kimble's Post-Conviction Motion Without Holding An Evidentiary Hearing

The Mississippi Supreme Court considers the summary denial and dismissal of a petition for post-conviction relief to determine whether the application presents a claim procedurally alive substantially showing denial of a state or federal right; if so, the petitioner is entitled to an in-court opportunity

to prove his claims. Gable v. State, 748 So.2d 703 (Miss. 1999).

CASE LAW IN THE STATE OF MISSISSIPPI dictates that a plea of guilty must be an intelligent and voluntary decision on the part of a defendant. SEE, Vittitoe v. State, 556 So.2d 1062, 1063 (Miss. 1990). When a plea of guilty is attacked on post-conviction motion and raises a question of whether the plea meets this requirement, an evidentiary hearing should be held. Myers v. State, 583 So.2d 174 (Miss. 1991).

Kimble's post-conviction motion did raise such questions of fact, and was properly pleaded with affidavits that did support his claims. The trial court should have given Kimble the opportunity to prove his claims by holding an evidentiary hearing. SEE, Reagus v. State, 2003, 837 So.2d 209.

The trial court abused its discretion, and did depart from the established law in the state of Mississippi concerning petitions that are supported by affidavits, that if found to be accurate and truthful, showing grounds that relief should be justified, the court should hear the petition. SEE, Sanders v. State, 439 So.2d 1271, 1276 (Miss. 1983).

It is clear from the trial court's denial, that that court did not really considered the issues of Kimble's motion in light of the law that did support these issues. And since the trial court only perfunctorily considered Kimble's motion, which is clearly evident from that court's order of denial. Kimble has been denied that in-court opportunity to prove his claims. In light of the facts

before this Court on appeal, the least that this Court could do is to REVERSE this CASE back to the Circuit Court of Lee County, Mississippi, for AN EVIDENTIARY HEARING ON the CLAIMS that Kimble had raised in his post-conviction motion. SEE ON, NEAL v. STATE, 525 So.2d 1279 (Miss. 1987); White v. STATE, 751 So.2d 481 (Miss. Ct. App. 1999).

CONCLUSION

Wherefore Premises Considered, the Appellant JUNIOR LEE Kimble MOVES this Court to VACATE the judgment of the Circuit Court of Lee County, Mississippi, AND grant him A NEW trial.

Respectfully Submitted this the 9th day of MARCH, 2007.

Junior Kimble
JUNIOR Kimble, #122757
DCF D-A-41
3800 County Rd. 540
GREENWOOD, MS. 38930

SUBSCRIBED AND SWORN TO BEFORE ME on this the 9th day of March, 2007

MISSISSIPPI STATEWIDE NOTARY PUBLIC
MY COMMISSION EXPIRES JULY 12, 2009
BONDED THRU STEGALL NOTARY SERVICE

Sharon Jendar
NOTARY

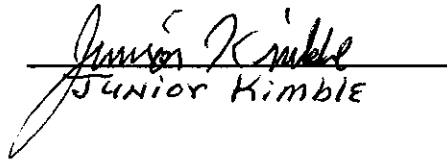
MY COMMISSION EXPIRES

CERTIFICATE OF SERVICE

This is to Certify, that I, Junior Kimble, the Appellant, have caused to be delivered this date, via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Brief of Appellant, to the below listed person.

Honorable Jim Hood
Attorney General
P.O. Box 220
JACKSON, MS. 39205-0220

This the 9th day of March, 2007.


JUNIOR KIMBLE

APPENDIX (1-A)

February 12, 2007

Junior Kimble, #122757
DCF D-A-41
3800 County Rd. 540
Greenwood, MS. 38930

Joyce R. Loftin,
Circuit Clerk - Lee County
P.O. Box 762
Tupelo, MS. 38802-0762

RE: Junior Kimble vs. State of Mississippi
Cause No. CU06-209(PF)L

Ms. Loftin,

This is to inform your office that the record in the above-numbered Cause fails to comply with Designation of Record Filed herein, as the record does not include the Guilty Plea Transcript in Cause Nos. CRO5-838(PF)L, CRO5-837(PF)L and CRO6-193. Would your office please correct this error as the guilty plea transcript is needed to support claims raised on appeal.

Thank you for your time and consideration in this matter.

Respectfully,
Junior Kimble

cc Betty Septon